Supreme Court, U.S.
FILED

No. 97 1017 DEC 19 1997

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

KARL M. MOULTON, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITION FOR WRIT OF CERTIORARI

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December 1997

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QUESTIONS PRESENTED

Whether Petitioner was denied effective assistance of counsel guaranteed by both the Sixth Amendment and 10 USC section 827.

Whether Petitioner's Sixth Amendment right to confront witnesses against him was violated when the military judge failed to admit the alleged victim's post-offense sexual behavior.

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The Petitioner, Staff Sergeant Karl M. Moulton, respectfully prays, that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on 29 September 1997.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, reported at 47 M.J. 227 (1997), is located at Appendix A. The order and judgment of the United States Air Force Court of Criminal Appeals, an unreported decision dated 29 July 1996, is located at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on 29 September 1997. The jurisdiction of this Court is invoked under 28 U.S.C. section 1259(3) (West Supp. 1996) and 10 U.S.C. section 867(a)(3) (West Supp. 1996).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides, in relevant part:

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

On 19 August 1994, at a contested general court-martial, the military judge found petitioner guilty of indecently assaulting and raping Senior Airman (SrA) Tressa Jordan and of willfully damaging a civilian's automobile in violation of Articles 134, 120, and 109, Uniform Code of Military Justice,

10 U.S.C. sections 934, 920 and 909, respectively. The defense called no witnesses in its case in chief and offered only four exhibits as part of its case. R. III–218–222. Appellant was sentenced to five years confinement, a dishonorable discharge, reduction to the rank of Airman Basic and total forfeitures of all pay and allowances. The convening authority approved the sentence as adjudged. In an unpublished opinion, the Air Force Court of Criminal Appeals affirmed. *See* Appendix B. On 29 September 1997, the Court of Appeals for the Armed Forces affirmed the decision of the Air Force Court of Criminal Appeals. *See* Appendix A. On 20 October 1997, Petitioner filed a Petition for Reconsideration with the United States Court of Appeals for the Armed Forces. As of 9 December 1997, the United States Court of Appeals for the Armed Forces had not ruled on that petition.

In September of 1991, SrA Tressa Jordan, met petitioner at the base hospital where both worked. R. 111–60. Petitioner took SrA Jordan out "quad riding" after a mutual friend had arranged for the two to get acquainted. R. 61. After riding they returned to SrA Jordan's apartment where she offered to make dinner for petitioner. R. 69. While she was in the kitchen she alleged that the petitioner came up behind her and started kissing her neck. R. 71. Petitioner then allegedly started "massaging" SrA Jordan's breasts under her shirt and then he supposedly "slipped his hand down to [her] crotch." R. 72. SrA Jordan testified that petitioner then "slammed" her into the corner of the kitchen and took her to the bedroom where he put her on the bed, she closed her eyes and then "felt his body come over [her] and he penetrated [her]." R. 77. After he was finished SrA Jordan said "he got up . . . I heard his jeans rustle . . . he was doing up the buttons of his jeans." R. 77.

SrA Jordan never came forward to authorities on her own. Petition for Clemency (hereinafter "PC") I–15. She

was called to Social Actions because of an investigation of the petitioner concerning charges dealing with another woman, Captain Predeiri. R. 86. Petitioner was acquitted of all charges involving Captain Predeiri.[1] SrA Jordan did not tell Social Actions everything she testified to at trial. R. 86, PC I–38. She was interviewed by Social Actions a "couple of times." R. 86. The next agency to interview her was the Air Force Office of Special Investigations (AFOSI). She also failed to tell them everything concerning the alleged rape. R. 86. SrA Jordan finally discussed with the legal office just prior to the Article 32 investigation that she had been raped, because she had heard rumors that petitioner was telling people she was his girlfriend and that she slept with him. R. 87. She then gave AFOSI another statement but the statement failed to include explicit details of the rape. R. 88. It was only after she was questioned by defense counsel that she decided to write out the details of the alleged rape, after she realized she remembered what actually took place. R. 88. Yet, earlier in the Article 32 investigation, SrA Jordan said she told the whole story because "[petitioner's] supervisor was talking about how the system would let him go without doing anything. She also said "the fact that nobody knew, was affecting my life, including my dating habits." R. V-Defense Exhibit D.

SrA Jordan never called the police after the alleged incident even though she said she was afraid for her life. R. 91, 92. She went to work as usual the next day. R. 80. She never called a rape crises hot line, nor did she seek any other type of counseling. R. 91. SrA Jordan said that she did tell a friend approximately six months to one year after the incident.

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[1]SrA Jordan's allegations against petitioner arose as a result of her interview with the Office of Social Actions during the investigation of Capt Predeiri's allegations. The interview was conducted "since it was common knowledge in the base hospital that she and [petitioner] had gone out together." R 1–15.

R. 92, 124. In her pretrial statement at the Article 32 investigation, however, SrA Jordan said she told Vaughn (her friend) only three or four months prior to the 13 August 1993 interview with Social Actions. R. V-Defense Exhibit D. SrA Jordan also said that she sought help from an Indian Medicine Man, although she never gave him any explicit detail. R. 92. SrA Jordan testified that she never was tested for sexually transmitted diseases and that five months after the alleged rape she had her annual OB-GYN appointment and then failed to tell anyone about a rape or an indecent assault. R. 97, PC I–14.

SrA Jordan's version of how she remembered the alleged rape was also contradictory. She said that she remembered the details of the rape all along but didn't want to talk about the "details freely to people that [she did] not know." R. II–116. The testimony from the Article 32 investigation, however, notes that she did not tell the whole story because she "did not want to be victimized all over again. [She] felt cleaner not putting in [her] whole statement and holding back some of what happened." R. V-Defense Exhibit D. Yet, in an interview with AFOSI in March, 1994, SrA Jordan said she did not come forward with the whole story because she "hadn't accepted that something had happened to [her]." R. V-Defense Exhibit C.

As a method of impeachment during SrA Jordan's cross examination, defense counsel sought to elicit testimony that, in fact, maybe she did have a post rape relationship with other military men contrary to her testimony that she did not. R. 96. As part of the cross-examination, defense counsel asked if she had sexual relations with a military person, a Major. Trial counsel's objection to the question was sustained. R. 96. The military judge indicated that the evidence was inadmissible. R. 96.

Petitioner was originally assigned area defense counsel from Hill AFB, Capt Leslie Long. Because of the serious nature of the offenses, circuit defense counsel, Capt Thomas Strafuss, was also assigned. These two represented appellant at the Article 32 investigation. Shortly before the Article 32 investigation, the petitioner hired civilian defense counsel, Mr. Gary Myers. By agreement with petitioner, Myers did not attend the Article 32 investigation. Because of scheduling problems the date of trial was postponed to early August. Myers was then released just two work days prior to the 2 August start of trial. PC 1–4. Petitioner released Myers as counsel for what he termed "political reasons."[2] Capt Long had to withdraw from the case because of a previously identified conflict of interest. PC 1–4. Prior to withdrawing and on the same day Myers was released, Capt Long submitted to trial counsel a defense witness list and request for the production of SrA Jordan's former husband. R. 111. (Ltrs dated 28 Jul 1994). The list consisted of four people. On 29 Jul 1994, Capt Long requested a trial delay, and contrary to trial counsel's objection, the delay was granted. R. III.

A new circuit defense counsel, Capt Sarkis-Rosenboom, was appointed to the case. R. 111. Capt Sarkis was unavailable until mid-August due to a previously scheduled general court-martial at Peterson Air Force Base, Colorado. Captain Power was detailed assistant defense counsel on 2 August 1994. R. III (Ltr dated 11 Aug). Finally, one week prior to the scheduled commencement of the trial the two new counsel assigned to the case arrived at Hill and started putting together the case for the petitioner. PC 1–5. These counsel,

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[2]Petitioner attached an affidavit to his brief to the Air Force Court of Criminal Appeals in which he explained the assignments, releases, hirings and firings of each of the different defense counsel that have worked on the case.

however, failed to present a defense case. R. 218–222. They called no witnesses and they advised appellant not to testify. Appellant's Affidavit, PC 1–5.

After trial, petitioner was assigned new counsel to address the clemency matters. PC I and II. Captain Philip Wold, Area Defense Counsel from United States Air Force Academy, was appointed for this purpose. Petitioner was ordered, by officials at Hill AFB, into confinement at Weber County Correctional Facility, placed in maximum security to include 23 hour/day lock down. PC 1–6. While there, however, petitioner was only classified as a medium security prisoner. PC 1-6 and PC Exhibit 9.

REASONS FOR GRANTING THE PETITION

I

Petitioner's Sixth Amendment right to confront witnesses against him was violated when the military judge failed to admit the alleged victim's post-offense sexual behavior.

A. Defense Counsel's Actions Fell Short of Reasonable Competence During the Findings Phase of the Trial.

Military personnel who are tried before a general court-martial are guaranteed the effective assistance of counsel. *United States v. Scott,* 24 M.J. 186, 187-188 (CMA 1987); *citations omitted* (both the Sixth Amendment and Article 27, UCMJ guarantee a military accused effective assistance of counsel). The military adopted the standard as described in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984) as the test for ineffectiveness claims. *Scott,* 24 M.J. at 187.

The test is two pronged. The petitioner must show that counsel's performance was deficient and that the deficient

performance prejudiced the defense in that it deprived the defendant of a fair trial. *Id.*, at 188. Viewing petitioner's defense by the totality of the circumstances, the performance of counsel falls short of what is expected for reasonable competence. *United States v. Saul*, 26 M.J. 568, 573 (A.F.C.M.R. 1988) (performance of counsel is to be evaluated from counsel's perspective at the time of alleged errors and in light of all the circumstances). The issue here is not a suggestion that defense counsel was required to conduct a mistake free trial but that the counsel did not utilize the customary skill and knowledge required in criminal cases, especially given the serious nature of this one. *United States v. Sublett,* 5 M.J. 570 (A.C.M.R. 1978) (no ineffectiveness shown given that defense was confronted with an almost impossible case and the entire defense was toward negating specific intent). Here the overall handling of the case was poorly conceived and executed.

This is a case where not one of the charges was supported by any evidence other than the testimony of the government's witnesses. There was no physical evidence of any kind which served to substantiate or corroborate the allegations. Given this, defense counsel adopted a theory that SrA Jordan, the alleged rape victim, was a liar. R. 226. Yet, they decided not to call any witnesses to advance the theory of their case, relying solely on impeachment through prior inconsistent statements. It is true there is no requirement that an accused put on evidence to rebut the government's case. *United States v. Hovell,* 36 M.J. 354, 359 (C.M.A. 1993) (there is no requirement that a defendant testify or produce witnesses). In this case, however, the failure to do so resulted in prejudice. Here, but for counsel's errors there is a reasonable probability that the outcome would have been different. *Strickland,* 466 U.S. 668, 104 S. Ct. 2052 (1984).

It is long established that appellate courts should not play "Monday morning quarterback" and second guess the trial tactics of defense counsel. *United States v. Sanders*, 37 M.J. 116, 118 (C.M.A. 1993). But courts have also said that the adversarial trial process must be preserved. *United States v. Galinato*, 28 M.J. 1049 (N.M.C.M.R. 1989) *citing United States v. Cronic*, 466 U.S. 648, 656 (1984) (the Sixth Amendment's requirement of effective assistance of counsel is violated when the trial loses its character as a confrontation between adversaries).

Here, for a number of reasons, the petitioner was denied that process. It cannot be said that defense counsel's trial tactics were prudent in the face of overwhelming evidence of guilt, since there simply was no overwhelming evidence. *United States v. Dale*, 39 M.J. 503, 509 (A.F.C.M.R. 1993) (holding that there was no ineffectiveness where accused was represented by counsel whose trial tactics were necessarily shaped by the strength of the government's case). The government's case was weak, as there was no physical evidence. Evidence from SrA Jordan was inconsistent and lacking in credibility, and finally Jordan's testimony was not consistent with earlier assertions of "rape trauma."

Military defense counsel provided ineffective assistance in four distinct areas. Defense counsel (1) failed to attack SrA Jordan's credibility by third party witnesses, (2) failed to put the defendant on the stand, (3) failed to present theory of consent, and (4) had minimal preparation time and used it ineffectively.

1. Failure to Attack SrA Jordan's Credibility by Third Parties

Defense counsel made a strategic decision to attack SrA Jordan's credibility. In her closing argument, the lead defense counsel tried to point out all the inconsistencies in SrA

Jordan's testimony and even called her a liar. R. 226. But when defense counsel tried to explain these inconsistencies, the weakness of the approach was apparent. The cursory run through some of the prior inconsistent statements pales in comparison to what could have been used to cross examine SrA Jordan. It is important for counsel to evaluate all evidence and determine a strategy that is most likely to be successful. *United States v. Fluellen,* 40 M.J. 96, 98 (C.M.A. 1994). The strategy of impeachment that was used did not and could not work without ensuring that SrA Jordan was pinned down to any statement. SrA Jordan was a witness who did not want to answer the questions posed. The judge at one point intervened and told SrA Jordan, "If she just asks you for a yes or no answer, just answer yes or no. . ." R. 93. At other times SrA Jordan was asking questions and defense counsel had difficulty controlling her.

> Q. Airman Jordan, at what point in time—Was it after the statement to OSI that you heard rumors about your intercourse with Karl?
>
> A. Which statement to OSI?
>
> Q. The first one.
>
> A. When was that taken? August?
>
> Q. Yes.
>
> A. August 13th?
>
> Q. Yes.

R. 93–94.

Rather than even attempting this colloquy since defense counsel had each statement that SrA Jordan had written or given, the prudent thing would have been to use the statement. This challenge to SrA Jordan's credibility simply is overshadowed by the argument counsel could have made had she used the statements. The inconsistencies were dramatic.

They cast serious doubt on SrA Jordan's ability to recall events.

For example, in a July 1993 statement, SrA Jordan said she bought a gun for her protection, whereas in an August 1993 statement she says she borrowed the gun. R. II, PC I-Exhibit III. At trial when discussing the issue of the gun she said she borrowed the gun from her mother. R. 113. But she was not confronted with her previous statements. R. 113. Another example is in the July statement, SrA Jordan said it took one month for appellant to stop bothering her. In the August 1993 statement, she says it took two months. The only statements, however, that the defense counsel used were the two included as Defense Exhibits C and D. One further example of the burgeoning story is the fact that in the July 1993 statement SrA Jordan said she went out with petitioner because he was a nice guy. PC 1–15 and Exhibit III. Yet, at trial she said she did not know petitioner well enough to like or dislike him. Defense counsel never impeached her though. The July statement was in the possession of the defense and it was SrA Jordan's own statement. In the first statements, there was a complete lack of detail. That detail developed over a 33 month period; a long enough to give SrA Jordan time to concoct facts to fill the details to the questions that were asked.

The problem is that defense counsel did not attempt to use prior inconsistent statements against SrA Jordan except for two documents, Defense Exhibits C and D (dated 21 Mar 94 and 27 Apr 94). The defense team did not use statements dated 27 Jul 93, 13 Aug 93 or 16 Aug 94. SrA Jordan told a version of the story on at least seven different occasions, each version different. It was the last version, the one she wrote for the government just days before trial, a trial that had been delayed from early August, that she used at trial. This version was dramatically different than anything SrA Jordan had said up to that point, including the story she gave when the defense

team interviewed her in mid-August. It would have been more damaging to use all of the other statements no matter what the explanation for the previous omissions than to only use bits and pieces from two statements. Certainly the ability to recall and tell the government exactly what happened only days before the trial when on at least five previous occasions her recall was nowhere near as accurate is a point that should have been more fully developed rather than simply revealed in a cursory manner.

Defense counsel's failure to use impeachment evidence would not warrant a new trial if the evidence were tangential to the central issue at trial. Here, however, SrA Jordan's July and August 1993 statements (PC 1, 38–42) "materially contradicted significant elements of [her] testimony at trial." *State v. Fritz*, 105 N.J. 420, 519 A. 2d 336 (1987). And, the contradictions and omissions were as to the acts that constituted the offenses charged. Under these circumstances the failure to impeach her with major inconsistencies could well have altered the outcome of this trial.

As for SrA Jordan's truthfulness being fully explored, here again defense counsel failed. They did not call any witnesses as to her character for truthfulness. M.R.E. 608(a). The failure to explore this area when witnesses were available to testify was "measurably below the standards... set for practitioners before military courts." *Id., citing United States v. Scott*, 24 M.J. at 193. While the issue there was failure to investigate it should be carried over to where defense counsel did some investigation but failed to utilize what they had and failed to complete their entire investigation. For example, at the defense's disposal was a full-time defense investigator. This investigator, Staff Sergeant (SSgt) Forrett, accompanied defense counsel to an interview of SrA Jordan on 11 August 1994. At the interview SrA Jordan could not recall certain events. At trial she was specifically asked about those events.

R. 112, 113.

> ADC: Do you remember telling Captain Sarkis and I that you were so traumatized you couldn't remember?
>
> A. No, I don't, ma'am
>
> Q. Do you remember telling us that you didn't remember how your underwear came off?
>
> A. No, I don't, ma'am.

Yet, even though SSgt Forrett was present at the interview, he was not called as a rebuttal witness. Nor were other witnesses called that could speak to the reputation and character of SrA Jordan for truthfulness.

Credibility may be attacked by extrinsic evidence. Military Rule of Evidence 608(c) allows for impeachment "otherwise adduced" where there is evidence of bias, prejudice or motive to misrepresent. Here, SrA Jordan had a motive to misrepresent, yet defense counsel never called witnesses such as Technical Sergeant (TSgt) Satterfield, Major Marchand, TSgt Scott, SrA Cummings or SSgt McCracken (SrA Jordan's ex-husband). Prior defense investigation had uncovered that each of these men had knowledge of SrA Jordan's dating and sexual habits, even after the alleged incident and could have rebutted her testimony. *See generally,* PC 1, 56–66. "The failure of trial defense counsel to proffer such evidence for the trial judge's resolution, well knowing the importance of the only real evidence discrediting [SrA Jordan's] testimony. . . clearly does not reflect a strategic choice premised upon reasonable professional judgment." *United States v. Chesley,* 1987 CMR Lexis 586 (N.M.C.M.R. 1987). In fact, affidavits obtained after the trial indicate that SrA Jordan had a propensity to lie about her relationships, to include sexual encounters, with other military men. PC 1, 57–67. It was fatal error not to

attack the lack of veracity of SrA Jordan. The failure to present these witnesses renders the outcome of the trial unreliable as an adversarial process.

Also the failure of trial defense counsel to investigate some, if not all of these potential witnesses renders the performance ineffective. Here, counsel was not in a position to effectively rebut SrA Jordan's testimony as they did not adequately prepare for it. The potential witnesses whose testimony was never sought all indicated that SrA Jordan told them of her relations with other military men or even had relations with her. It is apparent that had such testimony been elicited SrA Jordan's credibility would have been not only diminished but also destroyed.

In petitioner's affidavit, at page 4, he stated that he did not agree with counsel regarding defense counsels' strategy of the case. In the ABA Standards for Criminal Justice 4–5.2, the decisions of how to conduct a cross-examination and what motions that should be made or what tactical decisions should be made fall within the province of the lawyer. Yet, as the commentary to that standard points out, some decisions are not tactical or strategic and reveal "ineptitude, inexperience, lack of preparation or unfamiliarity with basic legal principles amounting to ineffective assistance of counsel." *Id.* Here there is indication that defense counsel were inexperienced, had little time to prepare the case and were unfamiliar with some basic legal principles.

By the defense team's failing to call specific witnesses and properly impeach theprosecutrix, petitioner was denied the adversarial process that is inherent in all trials. Without such a process the outcome of the trial was not reliable.

2. Failure of Petitioner to Testify

There were other inconsistencies that were never fully developed at trial by the defense and they have to do with

differences between petitioner's version of what happened and SrA Jordan's version. Petitioner, however, was never given the opportunity to tell his side, even though he wanted to. When there is not much to work with it might be reasonable not to call the defendant or other witnesses. *United States v. Tyler,* 36 M.J. 641, 644 (A.C.M.R. 1992). Here though, there was no apparent reason for not calling the accused to confront the rape charges. His story clearly rebutted that of his accuser, SrA Jordan. Counsel apparently was afraid that 404(b) evidence would surface and appellant certainly be convicted. Appellant's Affidavit, p. 4. Civilian counsel, however, had submitted a motion in limine to exclude the evidence of a prior rape allegation. R. 111. This allegation was 10 years old at the time of trial. There is no indication the motion was ever ruled on, yet it was one dispositive way of dealing with the concern over the allegation. Counsel has a responsibility where possible to take the guess work out of trial strategy. Here counsel did nothing—to the marked detriment of the petitioner.

Additionally, there was some indication that appellant did not testify because counsel thought the government's case was weak. This reasoning is counterintuitive. Because the testimony by the government witnesses could not be buttressed by other evidence it was essential that there be some testimony from the petitioner. Again, the adversarial process was diminished when there was simply no real justification for keeping the petitioner off the stand. The petitioner's credibility could only be tested through testimony. His credibility was clearly in issue. There can be no reasonable "degree of certainty that he would have been convicted if his version of events had been before the fact finder or if the question of the victim's veracity had been fully explored." *United States v. Polk,* 32 M.J. 150, 153 (C.M.A. 1991).

3. Failure to Present Defense Theory

The failure to present a theory of the case on the charges of rape of SrA Jordan other than to woefully attempt to impeach her fell below standards of professional competence and in this case professional ethics. The petitioner told all counsel that sex with SrA Jordan had been consensual, Affidavit at p.4, and that sex did not occur on the night appellant and SrA Jordan went ATV riding as she alleged. PC III. The ATV trip to Francis Peak occurred on a night separate from the night of the consensual sex. PC I–30.

Counsel not only failed to present consent as a defense but also made misrepresentations to the court. In closing argument, counsel told the court that no intercourse had occurred and that after the ATV ride appellant went to SrA Jordan's apartment for dinner. R. IV–226. Neither statement was true. The rules of professional conduct require candor to the tribunal. (Rule 3.3(a)(1)). Thus counsel's closing argument was an improper assertion that falls below the prevailing professional norms. "[C]ourts should not tolerate deliberate mistakes which amount to both a dereliction of duty and an egregious lack of candor toward the courts." *Deutscher v. Whitley,* 884 F.2d 1152, 1162 (9th Cir. 1989).

Counsel had a defense of consent and knowingly failed to use the defense. It is well established that consent is an available and absolute defense to the charge of rape. *United States v. Clark,* 35 M.J. 432 (C.M.A. 1992) (noting consent is not merely an affirmative defense); *United States v. Bratner,* 28 M.J. 941, 943 (N.M.C.M.R. 1989) (stating consent negates the offense itself). It cannot be ignored. Further, consent is a far more compelling defense than an attempt to suggest the event just did not happen, as the latter approach requires significant motive to lie and to do harm to appellant on the part of the prosecutrix, none of which was shown.

The consent approach gives rise to mistake of fact questions and requires less in the way of attacking the credibility of the prosecutrix. *See, e.g. United States v. Taylor,* 26 M.J. 127 (C.M.A. 1988) (explaining mistake of fact as to victim's consent is available as an affirmative defense to rape and panel should be so instructed). If such a defense is available, it must be used.

In *United States v. Curtis,* 38 M.J. 530 (N.M.C.M.R 1993), the court examined the issue of "whether the defense theory at trial was reasonable based on the information available at that time. . ." *Id.* at 539. The court in *Curtis* noted that "realistically, a defense attorney develops his case in large part from information supplied by his client." *Id. citing United States v. Decoster,* 624 F. 2d 196 (1976)(en banc). The court held that the strategy used by the defense was not unreasonable where one theory was chosen over another as hindsight was sharpened by facts discovered after trial. This case must be distinguished from *Curtis.* Here consent was not just an alternate theory that might have been developed after the trial. The defense team knew from the very beginning of the case that the sex that took place between SrA Jordan and the petitioner was consensual, yet they failed to utilize the information obtained from their client. Given the information known to the defense team at the time of trial, counsel failed to present a strategically reasonable defense theory—one that negates the offense itself.

4. Insufficient Preparation Time

It is an established legal principle that where substitute counsel do not have sufficient time to prepare a case for trial that ineffectiveness may result. Here there is such an issue. "In dealing with the issue, courts consider the time available, the complexity of the factual and legal issues and the way in which counsel utilized the available time." *United States v. Marcano-Garcia,* 622 F.2d 12, 17 (1st. Cir. 1980). In this

case, while the case may have been ready to go to trial with other lawyers there was inadequate time for the counsel who actually defended the case to properly investigate and establish their defense. As set forth above, the lack of preparation was apparent and because of this, the petitioner was prejudiced. Given the failure to properly present a defense and the failure to call witnesses to rebut and impeach SrA Jordan, the lateness of the appointment of the fifth and sixth military counsel in the case is "strong evidence in defendant's behalf" that counsel failed to provide effective assistance. LaFave, *Criminal Procedure,* 2d ed. § 11.8 (b), 1992.

It is not conclusive of effectiveness that the defense obtained an acquittal on one more of the charged offenses. *United States v. Sublett,* 5 M.J. 570 (A C.M.R. 1978) (Perry, J. concurring.) Here, because of the insufficient time counsel had to prepare for the case, evidence that might have otherwise been presented was merely labeled as "unnecessary." Certain witnesses were not talked to simply because the previous defense counsel had already done so and because the defense investigator was available to the new defense team. Apparently, these ineffective decisions because of a lack of adequate time to prepare for trial. However, a defendant is entitled to counsel who are adequately prepared for trial. *United States v. Jones,* 6 M.J. 770 (A.C.M.R. 1978). Time in this case was crucial to the defense team. In order to properly grasp the complexity of the case a continuance should have been asked for and granted.

The military judge ruled in early August that he would grant no further continuances in the trial. R 11. This may have been a deterrent to the defense team for asking for a delay, but it should not have been the pivotal point in the decision process. Speedy trial issues aside, the defense team needed time to put on an adequate defense and preserve the adversarial process.

B. The Lack of Continuity of Counsel and the Misconduct of the Area Defense Counsel Prejudiced the Appellant during the Pretrial Phase.

Appellant in effect had six different defense counsel in his case. PC Vol. 1, page 4; Affidavit. Each of whom gave differing advice. The first defense counsel assigned, the Area Defense Counsel (ADC) to Hill AFB, served as counsel at the Article 32, UCMJ, investigation, but transferred to another base prior to trial. The next ADC, Capt Leslie Long, at Hill AFB inherited the case and along with Circuit Defense Counsel, Capt Thomas Strafuss, represented appellant at the Article 32 investigation. Shortly after the Article 32 investigation, Capt Strafuss was released from representing appellant. R III. Later, Capt Long withdrew from the case based on a conflict. PC I–4. A civilian attorney, Mr. Gary Myers, was dismissed by the petitioner on 28 July 1994, after he received false information from Capt Long with regard to Myers' ability to proceed to trial. PC I–4, and Attachment 8; R III. Finally, the petitioner was assigned two military counsel who eventually represented him at trial. These two counsel, Captains Sarkis-Roseboom and Power, however, had only two weeks to become acquainted with the evidence and prepare for trial. Essentially, they were given eight days to put together a case that carried a life sentence.

All of the assignments and releases of the different defense counsel had the effect of denying the petitioner adequate representation by counsel of his choice. An accused has a right to counsel of his choice. *United States v. Keys*, 29 M.J. 920, 922 (A.C.M.R. 1989). This right is guaranteed by Article 38, Uniform Code of Military Justice.

Not only was the petitioner denied effective assistance because of all the changes but he was also prejudiced due to the limited preparation time discussed earlier. The most

blatant form of prejudice occurred when the ADC, Capt Long, interfered with the relationship between the petitioner and his civilian attorney. Prejudice may manifest itself through the destruction of the attorney-client relationship. *United States v. Marshank*, 777 F. Supp. 1507, 1521 (U.S. Dist. 1991).

On 28 July 1994, just two days before the commencement of trial, the petitioner released his civilian defense counsel. The release occurred because of a belief generated by Capt Long that the civilian counsel was unprepared to go to trial. Capt Long, however, never approached the civilian counsel with his concerns. PC I–137–141. Capt Long instilled in appellant a distrust of the civilian counsel and encouraged his release. Yet, there was no evidence that the civilian counsel was not prepared for trial. It has been established that when a defendant proceeds to trial with a prepared counsel he trusts, the outcome of the trial may be different then where he goes to trial with counsel in which he is not confident. *Keys*, 29 M.J. at 924.

Here the confidence and trust needed in counsel was undermined by Capt Long's actions. Even Capt Long failed to bring the case to trial as scheduled. First, he felt he was not experienced enough to handle the charges, as Capt Strafuss became lead counsel; and second, Capt Long waited until the last minute to leave the case knowing all along he had a conflict of interest, as he was also representing one of the government's witnesses in a separate matter. When approached by trial counsel with concerns of the witness/client, Capt Long was forced to withdraw. Appellant's Affidavit at p. 3. A lawyer should exercise independent professional judgment on behalf of a client. *United States v. Lespier*, 558 F. 2d 624, 628 (1st Cir. 1977) (a lawyer's personal interest, the interests of other clients or the desires of third persons should not interfere with the loyalty owed to a client). Capt Long's failure to advise either

the civilian counsel or the petitioner of the potential conflict was an egregious error when coupled with Capt Long's interference with the petitioner's relationship with his civilian counsel. Essentially, Capt Long left the petitioner without effective counsel.

"The relationship between an attorney and client is personal and privileged. It involves confidence, trust, and cooperation." *United States v. Miller,* 2 M.J. 767 (A.C.M.R. 1975). Here those essential elements were lacking with the relationship between Capt Long and appellant. Any trust that existed with the petitioner certainly dissipated when he was left the day before trial with no advocate on his behalf. It was Capt Long's responsibility to bring the case to trial, especially after he persuaded the petitioner to fire his civilian counsel. When he reneged on that duty he undermined the military justice system. He also reneged on a duty when he failed to adequately explain a conflict issue and the possibility that he might not bring the case to trial. The relationship between Capt Long and the petitioner was destroyed and it left a concern in the petitioner as to his best interests.

The trial was eventually continued for another two weeks but the petitioner was tainted with a distrust of counsel. He was appointed counsel who had to learn the case and prepare it in less than a week and a half. Appellant's Affidavit p. 3.

II

The military judge erred to the prejudice of the petitioner by failing to admit the alleged victim's post offense sexual behavior.

At issue in the trial was the prosecutrix's credibility as there was no physical evidence to prove that the petitioner raped or indecently assaulted her. On cross-examination defense counsel tried to illicit that after the alleged rape SrA

Jordan dated an Air Force Major assigned to the hospital despite her contentions that she was afraid to go out or date military men. R. 84, 95–96. SrA Jordan denied dating the Major and denied telling defense counsel about the relationship. Defense counsel then asked if she had in fact slept with the Major. Trial counsel objected, the judge sustained, saying "Defense counsel, the issue going to credibility has to do with whether or not the witness dated somebody. Restrain yourself to that area." R. 96. The defense did not pursue either line of questioning or proffer expected testimony.

Notwithstanding, the judge erred by not allowing the defense to confront the witness. The military judge did not weigh whether the sexual misconduct evidence should be allowed. Evidence of sexual misconduct to be admitted must be "relevant, material, and favorable to the accused." *United States v. Hollimon,* 16 M.J. 164, 65–55 (C.M.A. 1983). By not allowing the defense to examine the witness in this area the judge denied it the opportunity to follow through with impeachment by contradiction. The judge should have at least evaluated the probative value of the testimony. *Id.,* at 166. It has long been established that M.R.E. 412 is not an absolute bar to the admission of evidence of a victim's past sexual conduct. *United States v. Oxford,* 23 M.J. 548, 551 (A.C.M.R. 1986).

Furthermore, an accused's right to cross-examine, "to test the truth of their testimony, should not be lightly denied." *United States v. Whitaker,* 34 M.J. 822, 828 (A.F.C.M.R. 1992) (military judge committed error affecting appellant's Sixth Amendment confrontation rights where post offense sexual conduct of victim was excluded). Had petitioner been allowed to cross-examine SrA Jordan as to her transgressions with the Major, the impeachment may have been completed thus affecting the judgment of the trier of fact. Defense

counsel sought to prove neither the unchaste character of SrA Jordan nor that she had a habit of consenting to sexual relations. *United States v. Colon-Angueira,* 16 M.J. 20, 24 (C.M.A. 1983)(judge erred in not allowing post-offense sexual conduct, court ruled evidence of motive to consent may be allowed where relevant and material). From the transcript it appears that the defense sought to prove that despite allegations of never dating military men, SrA Jordan actually did date another military man after the alleged incident and in fact not only dated him but had a sexual relationship with him. The purpose of the cross examination had relevance "apart from suggesting that a promiscuous person is not credible and is prone to engage indiscriminately in sexual intercourse." *Id.,* at 28 (Everett concurring.)

The evidence that SrA Jordan did in fact continue to date military men, had the defense been allowed to confront her and establish this, along with the evidence that her story continued to grow each time she told it is relevant to whether or not she could be believed, especially in light of the fact there was no physical evidence of the alleged rape. While defense counsel must establish the basis for admissibility, here the defense was ordered to restrain itself to one area, that is whether SrA Jordan dated military men. Despite no proffer the relevance of the evidence was apparent. At trial the testimony was as follows:

> Q. Airman Jordan, do you remember Major Marchand?
>
> A. Yes, I do. And I—
>
> ATC: Objection, Your Honor. 412 (b), going into specific instances of the sexual conduct of the witness; rape shield law.
>
> MJ: Well, are you going to the witness's credibility at this point?

> ATC [sic]: Your Honor, yes. She stated on direct examination that she refuses to date military members, and in fact, she has.

R. 96. To clarify, defense counsel asked if she remembered telling the defense in an interview that she did date and even slept with the Major. The evidence was relevant and material to the strategy of the defense. "Often the mistaken exclusion of defense evidence because of an overly rigid application of Rule 412 will require reversal." *Id.* The evidence was relevant not for proving consent but for proving that SrA Jordan had lied about her post alleged rape activities and that she had not experienced the trauma that she suggested she had experienced. In other words she was lying and her credibility was adrift.

The petition for a writ of certiorari should be granted.

CONCLUSION

Many of the outcome determinative decisions made by military defense counsel at trial were not based on tactical decisions but were instead manifestations of ineffective assistance.

Counsel was given only eight days to prepare for a trial that carried a life sentence. This is definitionally problematic and should have been vigorously protested by counsel. It was not.

Counsel knowingly utilized a case theory which appellant had told counsel was untrue; namely, that no sexual conduct had occurred. In fact, petitioner advised counsel that there was consensual sexual contact and that it happened on an occasion different than the one where SrA Jordan and Petitioner had gone All Terrain Vehicle (ATV) riding.

Counsel failed to utilize known resources in the petitioner's case in chief to attack the credibility of the complaining witness. Counsel failed to put petitioner on the witness stand when the only evidence against petitioner was

the oral representations of SrA Jordan. There was no physical evidence to support her allegations. Petitioner was prepared to testify in detail to the consensual nature of the relationship. All of the above decisions were outcome determinative and all prejudiced the outcome.

The tortious interference with the attorney-client relationship between civilian defense counsel and petitioner by Capt Leslie Long, the Hill AFB area defense counsel, along with the area defense counsel's failure to disclose a conflict of interest further prejudiced the petitioner's ability to have a meaningful defense.

The military judge erred by not allowing evidence of SrA Jordan's post alleged rape sexual activity into evidence. The purpose of the evidence was to challenge SrA Jordan's credibility. The value of this evidenced superceded rape shield considerations.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES, Appellee

v.

Karl M. MOULTON, Staff Sergeant
U. S. Air Force, Appellant

No. 96–1192

Crim.App. No. 31385

United States Court of Appeals for the Armed Forces

Argued April 10, 1997

Decided September 29, 1997

Counsel

For Appellant: *Lyn Marie C. Cusak* (argued); *Gary R. Myers, Lieutenant Colonel Kim L. Sheffield* and *Major Ormond R. Fodrea* (on brief).

For Appellee: *Captain Libby A. Brown* (argued); *Colonel Theodore J. Fink* and *Major Allen G. Erickson* (on brief); *Major LeEllen Coacher.*

Military Judge: Terence A. Curtin

Tried at Hill Air Force Base, Utah

Opinion of the Court

EFFRON, Judge:

At a contested general court-martial, the military judge found appellant guilty of indecently assaulting and raping Senior Airman TJ and of willfully damaging a civilian's automobile in violation of Articles 134, 120, and 109, Uniform Code of Military Justice, 10 USC §§ 934, 920, and

909, respectively. The military judge sentenced him to a dishonorable discharge, confinement for 5 years, total forfeitures, and reduction to the lowest enlisted grade. The convening authority approved these results, and the Court of Criminal Appeals affirmed in an unpublished opinion.

We granted review on appellant's petition to consider the following two issues that relate to the offenses against Senior Airman TJ:

> WHETHER APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY BOTH THE SIXTH AMENDMENT AND 10 USC § 827.
>
> WHETHER THE MILITARY JUDGE ERRED TO THE PREJUDICE OF APPELLANT BY FAILING TO ADMIT THE ALLEGED VICTIM'S POST-OFFENSE SEXUAL BEHAVIOR.

We find no prejudicial error, and we affirm the decision of the Court of Criminal Appeals.

I

The incidents at issue on appeal occurred in October 1991. Appellant, a co-worker and social acquaintance of Airman TJ, took her for a ride in his all-terrain vehicle. To show her appreciation, Airman TJ cooked dinner for appellant at her condominium. While they were in the kitchen, appellant sexually accosted Airman TJ. When she resisted, appellant dragged her into the bedroom, where he raped her. After appellant departed, Airman TJ telephoned her mother to arrange a visit with her, but she said nothing about the rape. Her mother recalled that Airman TJ had complained that a man "in the office where she worked" had assaulted her in the kitchen while fixing dinner after "bike riding."

Otherwise, Airman TJ told no one about the matter until she advised a friend in February 1992, and she did not report

the matter to law enforcement officials until she was questioned about an unrelated matter by Air Force officials in August 1993. At that point, she described circumstances that amounted to an indecent assault by appellant. Under further questioning, in March 1994, she stated that appellant had raped her.

At trial, the prosecution anticipated an attack on Airman TJ's credibility in view of her delayed report and her apparent reluctance to provide complete details during initial questioning. On direct examination of Airman TJ, trial counsel sought to explain these circumstances by demonstrating the traumatic effect of the incident on her. When asked by trial counsel if "this event affected your life," Airman TJ replied: "I don't go out. I do not date military after this incident. I don't want military people around me."

On cross–examination, defense counsel sought to impeach Airman TJ's testimony by asking if she had "dated" a Major M. Trial counsel objected on the ground that the question implicitly inquired into "specific incidents of the sexual conduct of the witness," which generally is prohibited under Mil.R.Evid. 412, Manual for Courts-Martial, United States (1995 ed.). The military judge viewed the question—which sought to impeach by contradiction the testimony of the witness on direct examination—as an appropriate inquiry under the exceptions to the general prohibition in Mil.R.Evid. 412.

In response to the question, TJ denied that she had dated Major M. Defense counsel then asked, "Isn't it true that you slept with him [Major M] on the first or second date?" Before the witness could respond, the military judge directed defense counsel to limit his questions to matters of dating. As the Court of Criminal Appeals observed: "Defense counsel did not complain [about this restriction], otherwise ask the judge to reconsider his ruling, make a proffer of evidence, or even pursue the line of questioning." Unpub. op. at 3.

II

The Court of Criminal Appeals noted that defense counsel has the burden of demonstrating why the general prohibition in Mil.R.Evid. 412 should be lifted to admit evidence of the sexual behavior of the victim and that, in this case, the defense counsel failed to demonstrate the specific evidence that he would introduce or to articulate a theory of admissibility. In that context, the court held that the military judge did not abuse his discretion in precluding further questioning along this line.

We agree under these circumstances. We note, however, that a different result might well have obtained if defense counsel had pursued the matter at trial. The prosecution opened the door to this area of inquiry by raising the issue of the victim's relationships with other men. Implicit in the opinion of the court below is recognition that the defense might have articulated a theory of admissibility under one of the exceptions in Mil.R.Evid. 412. It is possible that defense counsel might have developed a plausible theory of admissibility based upon impeachment by contradiction, if supported by proffered evidence of expected testimony relevant to that theory. Defense counsel, however, did not make a proffer of any testimony proving the existence of a sexual relationship that would have provided significant evidence on an issue of major importance to the case—the credibility of the witness' explanation for the belated timing of her report of the incident.

In addition to challenging the ruling of the military judge on this issue, appellant now attacks his defense counsel as ineffective because "[t]here were individuals available to testify about [TJ's] dating habits and the Major, albeit a Fifth Amendment candidate, was also available to testify at a hearing or in rebuttal. None was ever called. This was both ineffective and prejudicial." Final Brief at 8–9.

The Supreme Court has made it clear that a defendant who seeks to relitigate a trial by claiming ineffective assistance of counsel must surmount a very high hurdle. In *Strickland v. Washington*, 466 U.S. 668, 689 (1984)(citation omitted), the Court observed:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Strickland established a two-part test which has been applied by this Court for consideration of ineffective-assistance claims in the military justice system. *United States v. Scott*, 24 MJ 186 (CMA 1987). Appellant must demonstrate: (1) a deficiency in counsel's performance that is "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"; and (2) that the "deficient performance prejudiced the defense . . . [through] errors . . . so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland, supra* at 687.

Appellant has not surmounted the hurdle established by *Strickland* and its progeny with respect to affirmatively demonstrating counsel's deficiency. Although appellant asserts that "[t]here were individuals available to testify about [TJ's] dating habits and the Major . . . was also available to testify at a hearing or in rebuttal," appellant has not met his

burden of production under *Strickland.* He has failed to bring to the attention of this Court specific information—such as the substance of expected testimony from Major M—that would support the claim of ineffective assistance. If these individuals exist, it is the responsibility of the defense to identify them and to advise this Court precisely what they would have said. *See* Mil.R.Evid. 103 (a) .

There may well be cases, particularly where the substance of proposed testimony is not at issue and the case involves the strategic choices of counsel, that overcome the presumption of competence. *United States v. Lewis,* 42 MJ 1, 6 (1995). In such instances, it may be necessary for an appellate court to order "affidavits, interrogatories, or a factfinding hearing." *Id.* This is not such a case, because appellant has not even established a foundation for his claim by demonstrating that specific individuals would have provided the court with specific testimony. If the individuals are members of the armed forces, as appellant has suggested, he should have been able to obtain their statements for purposes of this appeal. If such efforts were unavailing, appellant could have requested military or judicial assistance in locating the individuals and obtaining statements. In the absence of such information or some explanation as to why it could not be obtained, it would be inappropriate under *Strickland* for this Court to presume counsel's ineffectiveness for failing to call witnesses.

As this Court noted in an early opinion, *United States v. Bigger,* 2 USCMA 297, 301, 8 CMR 97, 101 (1953), which was quoted in the instant case by the Court of Criminal Appeals:

> It is not unusual for losing litigants to lay the blame for their conviction on the doorstep of those who represent them . . . . The charges are sweeping, but there is no evidence to sustain them. At most they

> are assertions in the brief on appeal, unsupported by any appropriate and relevant facts.

Unpub. op. at 6. Those concerns are no less important today under the tests established by *Strickland*. In most ineffectiveness cases, an accused is in the best position to identify relevant information and present it to the appellate court. When factual information is central to an ineffectiveness claim, it is the responsibility of the defense to make every feasible effort to obtain that information and bring it to the attention of the appellate court.

III

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

Chief Judge COX and Judges CRAWFORD and GIERKE concur.

SULLIVAN, Judge (dissenting):

I agree with the court below that defense counsel's failure to proffer a reason for questioning the alleged victim about her post-offense sexual relationship with Major M supports the military judge's ruling cutting off the questioning of this witness. *See generally United States v. Williams*, 37 MJ 352 (CMA 1993). However, this conduct and defense counsel's additional failure to call Major M to rebut the alleged victim's testimony on her post-offense trauma is inexplicable. *See United States v. Shaffer*, 46 MJ 94, 100 (1997) (Sullivan, J., dissenting); *United States v. McCastle*, 43 MJ 438, 440 (1996) (Sullivan, J., dissenting).

I would remand this case to the Court of Criminal Appeals and require the defense counsel to file an affidavit explaining this apparent deficiency in not calling Major M. With this as a factual basis, then the court below could properly make an informed decision on the ineffective-assistance-of-counsel issue granted by our Court.

APPENDIX B

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant KARL M. MOULTON, FR006–76–0046
United States Air Force

ACM 31385

29 July 1996

Sentence adjudged 19 August 1994 by GCM convened at Hill Air Force Base, Utah. Military Judge: Terence A. Curtin (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 5 years, forfeiture of all pay and allowances, and reduction to E–1.

Appellate Counsel for Appellant: Lynmarie Cusack, Esq (argued), Colonel Jay L. Cohen, and Major Ormond R. Fodrea.

Appellate Counsel for the United States: Captain Libby A. Brown (argued) and Colonel Jeffery T. Infelise.

Before

PEARSON, SCHREIER, and MORGAN, C.H., II
Appellate Military Judges

OPINION OF THE COURT

PEARSON, Senior Judge:

In a bench trial, a military judge convicted appellant of indecently assaulting and raping Senior Airman TJ and willfully damaging a civilian's car by pouring caustic chemicals on it. The judge acquitted him of maltreating Airman TJ as a subordinate, and of raping, threatening, and being disrespectful to Captain KP, his married paramour. The judge sentenced appellant to a dishonorable discharge, 5 years confinement, forfeiture of all pay and allowances, and reduction to E–1, which the convening authority approved.

Not content with his defense team's successes at trial—they got dismissals on three specifications by motion and acquittals on eight others—appellant claims his two lawyers were ineffective within the Sixth Amendment. Appellant also argues the military judge erred in excluding evidence of Airman TJ's post-offense sexual behavior, the evidence is legally and factually insufficient to establish the penetration element of rape, and the post-trial processing of his case was flawed. We affirm.

FACTS

Airman TJ, then an Airman First Class, met appellant when she was assigned to the hospital's patient squadron while undergoing extensive reconstructive surgery on her leg and arm following a car accident. Appellant worked in the hospital as a mental health technician.

One day in October 1991, appellant took Airman TJ out riding on his all-terrain vehicle. As thanks, Airman TJ made dinner for him at her condominium apartment. While the two were in the kitchen. appellant started kissing on TJ's neck. She "shrugged him off," but he grew bolder and began massaging her breasts and slipped his hand to her crotch. When she tried

to push his hands away, he "slammed" her into a corner and then came toward her as if to kiss her. She pounded on his chest and tried to dissuade him. He pushed her back into the corner where she hurt her healing leg. Appellant then "partially dragged" her into the bedroom where he had sexual intercourse with her while she cried and begged him to stop.

Airman TJ did not offer much resistance because she believed she had broken or shattered her leg again. When appellant left, she called her mother to see if she could visit her but didn't say anything about a rape. However, her mother recalled TJ complained that a man "in the office where she worked" physically assaulted her in the kitchen while she was fixing dinner after "bike riding."

Airman TJ didn't tell anyone else about the incident with appellant until February 1992. Amanda V, a friend, noticed that TJ had become withdrawn since the end of 1991. When she finally asked TJ what the problem was in February, TJ broke down in tears and said another military member had raped her in the condo.

In August 1993, Air Force officials questioned Airman TJ as a witness concerning allegations of harassment Captain KP filed against appellant. Airman TJ only told them that appellant had indecently assaulted her in the kitchen but left when she asked him to. She maintained that story through a series of interviews until March 1994 when she told a member of the base legal office that appellant had in fact raped her.

MILITARY RULE OF EVIDENCE 412 RULING

Near the close of the direct examination, the prosecutor asked Airman TJ if "this event affected your life." She replied, "I don't go out. I do not date military after this incident. I don't want military people around me." Defense counsel believed she had evidence otherwise and started to question Airman TJ about whether she "dated" a Major M.

Although the government opened the dating door, the prosecutor objected that defense counsel's cross-examination called for evidence concerning "specific instances of the sexual conduct of the witness, rape shield law" under Military Rule of Evidence (Rule) 412.

Realizing defense counsel's questions went to permissible impeachment by contradiction on a matter the prosecution raised, the judge overruled the objection and permitted questioning on whether "she has, in fact, dated military members." *See United States v. Welker,* 44 M.J. 85 (1996) (impeachment by contradiction). However, when Airman TJ denied "dating" Major M, defense counsel tried to take the questioning one step further by asking, "Isn't it true that you slept with him [Major M] on the first or second date." At that point, the judge stopped counsel's expansion of his ruling and restricted the questioning to "dating." Defense counsel did not complain, otherwise ask the judge to reconsider his ruling, make a proffer of evidence, or even pursue the line of questioning. Appellant now complains the judge erred somehow.

Rule 412 generally precludes admission of evidence about a nonconsensual sexual offense victim's sexual behavior, whether that behavior occurred before or after the alleged offense. *United States v. Whitaker,* 34 MJ. 822 (A.F.C.M.R. 1992). However, the Rule's prohibition must yield to "constitutionally required" cross-examination, that is, cross-examination which would produce evidence relevant, material and favorable to the defense. *United States v. Williams,* 37 MJ. 352 (C.M.A. 1993); *United States v. Diaz,* 39 M.J. 1114, 1115 (A.F.C.M.R. 1994). We review a military judge's ruling on Rule 412 issues under an abuse of discretion standard. *Id.*

We conclude the judge did not abuse his discretion in restricting defense counsel's cross-examination. Defense

counsel has the burden of showing the judge why the Rule 412 prohibition should be lifted to admit victim sexual behavior evidence. Counsel must show both a theory of admissibility and the evidence counsel intends to introduce to prove that theory. *United States v. Fox*, 24 M.J. 110, 112 (C.M.A. 1987); *United States v. Sanchez*, 40 M.J. 782 (A.F.C.M.R. 1994), *aff'd*, 44 M.J. 174 (1996). Here, counsel failed to provide that linkage when the military judge halted the questioning.

Although we find no abuse of discretion, we again urge trial judges to take time when confronted with Rule 412 issues. On the date of this trial, the judge did not have to hold a hearing until the defense counsel gave a sufficient theory of admissibility and offer of proof, which did not occur for any evidence past "dating." *Sanchez*. However, a recent revision to the Rule requires judges to conduct *in camera* hearings when the defense seeks to admit evidence about a victim's sexual behavior and afford the victim and parties a right to attend and be heard. Mil.R.Evid. 412, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.) We would expect cross-examination of the victim about sexual behavior to trigger that hearing as much as an offer of extrinsic evidence.

Finally, trial judges should make detailed findings pertinent to the reasons for any restriction or exclusion of defense cross-examination under Rule 412. *United States v. Hollimon*, 16 M.J. 164 (C.M.A. 1983); *Diaz*.

INEFFECTIVE ASSiSTANCE

Appellant puts his lawyers in the cross-hairs for five alleged deficiencies: (1) failing to sufficiently attack Airman TJ's credibility; (2) failing to call appellant as a witness; (3) failing to present a defense theory; (4) lack of preparation; and (5) ethical misconduct of an earlier detailed counsel.

Standard of Review

Appellate courts presume a defense counsel is competent until an appellant points out some error in performance which is unreasonable under professional norms. *United States v. Cronic*, 466 U.S. 648, 666 (1984). Where more than one attorney represents an accused, the court looks at the combined efforts of the defense team in assessing overall performance. *See United States v. Walker*, 21 U.S.C.M.A. 376, 380, 45 C.M.R. 150, 154 (1972). When examining an appellant's allegation of ineffectiveness, an appellate court will not second-guess defense counsel's tactical decisions with Monday morning quarterbacking. *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993); *United States v. Washington*, 42 M.J. 547 (A.F.Ct. Crim.App. 1995).

Thus, to obtain relief on an ineffective assistance of counsel claim, an appellant must show (1) an error in performance so serious that defense counsel was not functioning as the counsel guaranteed an accused by the Sixth Amendment, and (2) counsel's error deprived appellant of a fair trial, that is a trial whose result is reliable. *Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Scott*, 24 M.J. 186 (C.M.A. 1987). *See also Lockhart v. Fretwell*, 506 U.S. 364 (1993). Appellant fails to clear the first hurdle, much less the second.

Discussion

Defense counsel extensively cross-examined Airman TJ about her various inconsistent statements concerning whether appellant raped her, admitted two of the statements into evidence, and got TJ to admit telling various versions of the events. Defense counsel's theory was that TJ embellished her story every time she told it to counteract rumors that she and appellant were having an affair.

Appellant now says he wanted to take the stand and explain the sexual acts occurred but on a different "date" and were consensual. He also offers that other witnesses could testify about TJ's "dating and sexual habits" and poor character for truthfulness, but his counsel failed to call them (Appellant s June 6, 1995 post-trial affidavit and October 26. 1994 Petition for Clemency, vol. 1, para. 7c., contain his version of the events and evidence concerning Airman TJ.).

We decline appellant's invitation to engage in 20–20 hindsight. In a post-trial affidavit, appellant concedes that his counsel discussed the pros and cons of his testifying. Consequently, he was aware of the options and elected to cast his lot with his two lawyers' advice. That decision was probably a wise choice. Defense counsel made a successful motion *in limine* to prohibit the prosecutor from introducing any evidence of appellant's January 1985 grand jury indictment in Maine for "one count of Gross Sexual Misconduct" and his March 1991 civilian conviction (adjudication withheld) for assault. *See* Mil.R.Evid. 404(b). Appellant may have opened the door to that evidence had he testified.

Likewise, appellant concedes in his affidavit, "While I realize that counsel had certain strategy in mind in representing me, I got the distinct impression that my thoughts were not being listened to, especially in light of counsel's closing argument that implied I did not have sex with [Airman TJ]." Thus, appellant impeaches his own argument that defense counsel did not have a theory.

Defense counsel outlined the defense theme of the case—growing embellishment by the victim—in opening statement and stayed with it—it just didn't work. However, success of a theory is not the measure of is soundness—if it were, every litigated criminal case would have an incompetent lawyer since someone has to lose. Instead, we look at whether counsel made an objectively reasonable

choice in strategy. *See United States v. Ingham*, 42 M.J. 218 (1995); *United States v. Fluellen*, 40 M.J. 96 (C.M.A. 1994).

We find a reasonable choice of strategy here, even though defense counsel elected to forgo trying to rebut Airman TJ's denial of dating military members or have the judge reconsider his ruling precluding evidence concerning whether TJ had sexual relations with Major M. An accused is only entitled to reasonably competent counsel, not Clarence Darrow. Appellant's counsel ably put Airman TJ's credibility to the test through cross-examination. We are also mindful from years of experience that good advocates realize when they have scored the maximum impeachment points and avoid overkill that might create sympathy for a witness with the trier of fact.

We also totally reject appellant's insinuation that his counsel were unprepared when they were detailed to his case for over two weeks. They fully litigated the case, including making numerous well-developed motions to dismiss (some successful and some not), to compel discovery, and to preclude case shattering uncharged misconduct. At the end of the prosecution's case-in-chief, they argued a well-reasoned motion for a finding of not guilty on the maltreatment offense. *See* R.C.M. 917.

Finally, appellant has not established that a former detailed counsel, Captain L, committed any ethical misstep which impacted the case to appellant's prejudice. Captain L was appellant's second detailed counsel who took over after the first one departed on a reassignment. Captain L represented appellant at the pretrial investigation under Article 32, Uniform Code of Military Justice, (10 U.S.C. § 832) but later withdrew from the case due to a "conflict of interest" because he also represented a potential prosecution witness. Appellant never expressed any desire for Captain L to continue once relieved, and a defense counsel's prior representation of a prosecution witness is grounds for

withdrawal where a conflict of interest exists. *See United States v. Cote,* 11 M.J. 892 (A.F.C.M.R. 1981).

Contrary to appellant's argument, Captain L also did not thwart him in his attempt to have civilian counsel (the present civilian appellate counsel) represent him at trial. From the allied papers, we discern that no love was lost between civilian counsel and Captain L, and ultimately, appellant sided with Captain L and fired civilian counsel. However, we measure ineffectiveness of counsel claims based on the quality of an accused's representation at trial, not on alleged pretrial deficiencies which do not directly impact the trial. *Cf. United States v. Kloepfer,* 49 C.M.R. 68 (A.C.M.R 1974) (counsel "grossly negligent" in allowing pretrial questioning of accused during polygraph but also gave "rambling presentation" at trial). Appellant told the judge that he wanted to be represented by the two trial defense counsel who appeared with him at trial and no one else, and they represented him effectively.

In weighing appellant's complaints, we are mindful that he gave a very well-organized and quite lengthy oral unsworn statement in sentencing where he recounted his life experiences and impact of the trial on his family. Nowhere in it did he chastise his lawyers or assert his right to tell "his side of the story." Rather, he elected to have his counsel argue for a punitive discharge in lieu of jail and only voiced his claims of innocence after the trial when the crucible of cross-examination would be lacking.

In sum, we are reminded of Judge Latimer's observation over 40 years ago that, "It is not unusual for losing litigants to lay the blame for their convictions on the doorstep of those who represent them and this case varies little from the usual pattern. The charges are sweeping, but there is no evidence to sustain them. At most they are assertions in the brief on appeal, unsupported by any appropriate and relevant facts."

United States v. Bigger, 8 C.M.R. 97, 101 (C.M.A. 1953) (citations omitted).

SUFFICIENCY OF THE EVIDENCE

Appellant claims evidence on the penetration element of rape is lacking—it isn't. Airman TJ testified, "I felt his body come over me and he penetrated me." When asked if appellant used a condom, she answered. "No. I didn't feel a condom when he penetrated me." She later added, "I had semen between my legs. . . ."

Granted, the prosecutor should have elicited exact testimony to clearly show penetration during an act of sexual intercourse (penis entered vagina) instead of having the witness speak in terms of a conclusion. However, we are satisfied beyond a reasonable doubt from the circumstantial evidence that appellant penetrated Airman TJ's vagina with his penis. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Turner,* 25 M.J. 324 (C.M.A. 1987) (legal and factual sufficiency in general); *United States v. Hart,* 25 M.J. 143 (C.M.A 1987) (circumstantial evidence supported conviction of sex offenses); *United States v. Barrow,* 42 M.J. 655, 664–65(A.F. Ct.Crim.App. 1995) and cases cited therein.

POST-TRIAL PROCESSING

On October 20, 1994, appellant wrote the convening authority a letter challenging the latter's denial of his request for a deferment of the sentence to confinement. *See* R.C.M. 1101(c). On October 24, 1994, Major Wolusky, the prosecutor and base Chief of Military Justice, sent the letter to appellant's new counsel for post-trial matters, Captain Wold, stating, "There is no indication on the face of the letter that you [Captain Wold] agree to or coordinated on the submission of this missive which was dropped off at [the convening authority's office]." Major Wolusky also added, "In any case, it

is the position of our office and advice to the convening authority that the only communication between [him] and your client be through you, his current attorney of record." Captain Wold did not resubmit the letter to the convening authority.

At the outset, we note that judge advocates should be careful when immersing themselves in the post-trial processing of cases they prosecute lest they taint the convening authority's action. *See, e.g, United States v. Metz,* 16 U.S.C.M.A. 140, 36 C.M.R. 296 (1966). However, appellant has not challenged Major Wolusky's post-trial act on that basis. Instead, appellant complains Major Wolusky violated the post-trial clemency process by interfering in appellant's "right" to submit post-trial matters "directly" to the convening authority. We disagree.

Our reading of the President's rules for post-trial processing doesn't reveal any "right" that the accused has to personally deal with the convening authority unless the accused is representing himself or herself *pro se.* Instead, the post-trial processing rules of procedure, taken as a whole, contemplate that an accused will deal with the convening authority through defense counsel. *See* R.C.M. 1105, 1106.

In any event, we do not see anything which would preclude a convening authority from informing an accused that all dealings will be through the accused's counsel and the staff judge advocate. On the contrary, we conclude such a requirement is a reasonable means to ensure the convening authority fulfills his statutory duty to consider the accused's post-trial submissions before acting on the case. 10 U.S.C. § 860. To hold otherwise would inject mass confusion in the post-trial process since the staff judge advocate must insure all of the accused's post-trial submissions end up on the convening authority's desk and in the record of trial. *See, e.g., United States v. Green,* 44 M.J. 93 1996); *United States v. Foy,* 30 M.J. 664 (A.F.C.M.R. 1990) (en banc).

Moreover, appellant's counsel could have resubmitted the document if he thought it crucial to appellant's post-trial arguments to the convening authority. Since he didn't resubmit it, appellant forfeited any claim of error, and we do not find plain error. *See* R.C.M. 1105(d), 1106(f)(6). Even if Major Wolusky rejected appellant's October 20th letter in error, appellant is not entitled to relief. What appellant styles as a "clemency matter" was actually a legal argument contesting the denial of his deferment. A convening authority's failure to consider a claim of legal error will result in a new action only when an accused has been prejudiced. We do not find prejudice as appellant's letter would not have led to a more favorable action either on the deferment or his case in general. *See Green.*

CONCLUSION

The findings and sentence are correct in law and fact, the sentence is appropriate, and no error prejudicial to appellant's substantial rights occurred. Accordingly, the findings and sentence are

AFFIRMED.

Senior Judge SCHREIER and Judge MORGAN concur.

OFFICIAL

LAURA L. GREEN
Clerk of Court